Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

No. 79-503

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN FRIEDLANDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend (1) that the evidence failed to establish their membership in a conspiracy to distribute an obscene film in interstate commerce; (2) that there was no venue in the Western District of Tennessee; and (3) that they were tried under an improper standard of obscenity.

Petitioners' co-defendants have filed a separate petition for a writ of certiorari, raising the same questions. *Gordon* v. *United States*, No. 79-313. In our brief in opposition in that case, we have set forth the facts and answered the venue question and the related question regarding the proper community standards. We have also answered the claim that petitioners were prejudiced because their trial was conducted under the obscenity

standards of *Miller* v. *California*, 413 U.S. 15 (1973) while the ultimate question of guilt was determined under the test of *Roth* v. *United States*, 354 U.S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). We rely here on our opposition in *Gordon*, a copy of which we are sending to petitioners.

We do, however, elaborate on the sufficiency of evidence connecting these petitioners to the conspiracy.

Petitioners essentially contend (Pet. 9-12) that they were not tied to a single conspiracy to distribute an obscene film, and, further, that the acquittal of defendants Sherpix and Art Theatre Guild on the conspiracy count in the jury trial warrants reversal of their conspiracy conviction. These claims were properly rejected by both courts below. The district court found that a conspiracy existed between petitioners and Shiffrin, and Shiffrin's stipulated testimony supports that finding. See Pet. App. A-12 to A-13, A. 712-716.[1] As the court of appeals observed (Pet. App. A-9 to A-10):

> Unindicted but named co-conspirator Saul Shiffrin, Executive Vice President of Sherpix and Art Theatre Guild, supplied that link in ample measure and it was his testimony which connected the defendants one to another * * *. The indictment alleged and the proofs showed numerous overt acts undertaken by Shiffrin, notably arranging to transport the film into and out of the district of trial and contracting for the sub-distribution of "School Girl" with the defendants.

On the claim that acquittal of some defendants invalidated the convictions of petitioners, the court of appeals stated (Pet. App. A-12):

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[1] "A." refers to the joint appendix in the court of appeals.

> More fundamentally, however, we do not view the acquittal of Sherpix, Art Theatre Guild, Craddock and Craddock Films on the conspiracy charge as conclusive evidence that, for the purposes here, they did not actually commit the overt acts charged to them in the indictment. See *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, 898 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951).

Shiffrin's testimony connected petitioners to the nationwide distribution scheme, and the "interdependence of the subdistributors and their agreement to act in concert with one another in the circulation of the film * * * tied them together in a single criminal undertaking" (Pet. App. A-11). See *Hyde* v. *United States*, 225 U.S. 347, 365-367 (1912).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979